SUNNY YAP EU LEONG

v.

PUBLIC PROSECUTOR

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 52-458-92]
14 JUNE 1994

CRIMINAL LAW: Prevention of Corruption Act - Appellant acquitted of corruptly soliciting bribe under s. 3 (a)(ii) but convicted for corruptly accepting bribe under s. 4(a) of Prevention of Corruption Act 1961 - Widow sought to continue with appeal - Section 320 CPC - Whether appellant's widow has locus standi.

In this case, the appellant was charged at the Sessions Court for corruptly soliciting a bribe under s. 3(a)(ii) of the Prevention of Corruption Act 1961 (Act 57) and for corruptly accepting a bribe under s. 4(a) of the said Act. The appellant was acquitted after his defence was called of the offence under s. 3(a)(ii) but he was convicted of the offence under s. 4(a) of said Act. The appellant appealed against the conviction and sentence to the High Court. The appellant was sentenced to one day's imprisonment. Unfortunately, the appellant died during the pendency of the appeal and his widow sought to continue the appeal.

The question that was posed was whether the appeal abates upon the death of the deceased appellant.

Held:

[1] The widow has no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased appellant before his death, the widow has no *locus standi* to prosecute this appeal.

[2] The death of the appellant brought an immediate end to his appeal.

[Order accordingly].

Cases referred to:

Bhulan Lal v. The State [1954] AIR Allahabab 783 ***(cit)***
Harnam Singh v. the State of Himachal Pradesh [1975] AIR SC 236 ***(cit)***
Om Prakash v. The State of Haryana & Anor. [1979] AIR SC 1266 ***(cit)***
State v. Krishnan Pillai Madhavan Pillai [1953] AIR T. C. 233 ***(refd)***
H. M. Treasury v. Harris [1957] 2 All ER 455 ***(refd)***
Hodgson v. Lakeman [1943] 1 KB 15 ***(refd)***
R v. Rowe [1955] 2 All ER 234 ***(refd)***
Lim Tien Hin & Ors. v. R [1953] MLJ 213 ***(refd)***
Mohamed Ali v. PP [1956] MLJ 84 ***(refd)***
Hoe Kin Luan v. PP [1959] MLJ 159 ***(refd)***
Mohamed Johan Mutalib v. PP [1978] 1 MLJ 213 ***(refd)***
Smith Kline & French Laboratories v. Salim [1989] 2 MLJ 380, 382 ***(refd)***
PP v. Cho Beow Hin [1982] 1 MLJ 135 ***(refd)***
Duport Steels v. Sirs [1980] 1 All ER 529, 541 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 2(i), 173A(iii), 291, 294(ii), 295 to 299, 303A, 305, 306, 307, 316, 320, 426
Criminal Procedure Code 1973, s. 394
Juvenile Courts Act 1947, ss. 12(i), 21
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a), 13
Code of Criminal Procedure (V of 1898) ss. 411A, (2), 417, 431 (India)
Penal Code, s. 70 (India)

Other sources referred to:

Interpretation of Statutes, Maxwell, 12th Edn., pp. 1 & 2
The Law Commission of India, 41st report (September 1969, Vol. 1 pp. 297 to 281)

For the widow - Ranjit Singh M/s. Ranjit Singh & Co.
For the public prosecutor - Mohd. Razip bin Othman, DPP

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

Two charges were levied against the appellant, a Settlement Officer, for corruptly soliciting a bribe under s. 3(a)(ii) of the Prevention of Corruption Act 1961 (Act 57) ("the Act"), and for corruptly accepting a bribe under s. 4(a) of the Act. After a lengthy trial, the Sessions Court Judge called for the defence of the appellant on both charges and, finally acquitted the appellant of the offence under s. 3(a)(ii) of the Act but convicted the appellant of the offence under s. 4(a) of the Act. The public prosecutor appealed against the order of acquittal, while the appellant appealed against the order of conviction and sentence. For the conviction under s.4(a) of the Act, the Sessions Court Judge sentenced the appellant to one day's imprisonment and a fine of RM4,000 in default one year's imprisonment. The appellant was also ordered to pay a penalty in the sum of RM500 to the Government of Malaysia within one month from the date of the sentence. By virtue of s. 13 of the Act, that penalty shall be recoverable as a fine. The appellant paid both the fine and the penalty.

On 14 December 1993, the public prosecutor withdrew the appeal against acquittal filed by them earlier on, leaving only the appeal by the appellant against conviction and sentence intact. Unfortunately, the appellant died during the pendency of the appeal and his widow sought to continue the appeal.

The question for decision is whether the appeal abates upon the death of the deceased appellant.

Chapter XXX of the Criminal Procedure Code ("the CPC") contains provisions governing appeals. The pertinent section to refer would be s. 320 of the CPC which enacts as follows:

> Every appeal under s. 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

This section seems to lay down, at first blush, that an appeal against an order of acquittal (see s. 306 of the CPC) shall finally abate upon the death of the accused, and all appeals under Chapter XXX except an appeal from a sentence of fine, shall finally abate on the death of the appellant. If that is the appropriate interpretation, then there would not be any problem. But, unfortunately, this section is not free from criticism. The first limb of s. 320 of the CPC deals with appeals against orders of acquittal, which by necessity must necessarily abate because the accused is dead - gone to meet his maker and, consequently, beyond the jurisdiction of the Court. It is a well understood principle of natural justice that no order should be passed to the prejudice of a person unless he had an opportunity of being heard. The second limb of s. 320 of the CPC is controlled by the words "every other appeal under this Chapter." Now, the question to ask is this:- what are the other appeals allowed under Chapter XXX of the CPC? This necessarily involves an examination of the said Chapter in question. Thus, s. 305 of the CPC prohibits a convicted person from appealing against his conviction if he had earlier on pleaded guilty to the charge. He is, however, allowed to appeal as to the extent or legality of the sentence imposed. Section 307 of the CPC allows "any person" who is dissatisfied with any Judgment, sentence or order pronounced by any Magistrate's Court, (which includes the Sessions Court (s. 303A of the CPC)), in a criminal matter or case to which he is a party to prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of the sentence. Next, the powers of the High Court when exercising its appellate jurisdiction are listed in s. 316 of the CPC, in particular paragraph (b), where in an appeal from a conviction or in an appeal as to sentence, the Judge may reverse the finding and sentence and acquit or discharge the accused or order him to be retried or committed for trial; or alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.

In the present appeal, there is a composite order of sentence combining the substantive imprisonment with a fine and a penalty. It must be stressed that penalty is considered to be a fine. Would such a composite order of sentence be construed not to be an appeal from a sentence of fine within the meaning of the second limb of s. 320 of the CPC? It is common knowledge that an appeal from a composite order of sentence is ordinarily directed against both the substantive imprisonment and the fine. The imprisonment term and the fine plus the penalty must be considered together and must not be dissected into two. Considered together, it would mean that an appeal against the composite order of sentence would abate on the death of the appellant. The appellant's widow has no *locus standi* to prosecute the appeal for the simple reason that it was her late husband that was convicted and not herself. There is no merit in the argument advanced on her behalf that she wanted to clear her husband's name. In construing the law, sentimental interest of the widow has no force of reckoning at all.

In India, the equivalent of s. 320 of the CPC would be s. 431 of the Indian Code of Criminal Procedure (V of 1898) which reads as follows:

> Every appeal under s. 411A, sub-s.(2) or s. 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Both s. 411A, subsection (2) and s. 417 of the Indian Code of Criminal Procedure (V of 1898) relate to an appeal against an order of acquittal and an appeal to the High Court for enhancement of sentence respectively. Subsequently, an amendment to s. 431 of the Code of Criminal

Procedure (V of 1898) was made. **The Law Commission of India** by its 41st report (September, 1969, Vol. 1, pp. 279 to 281) found it germane to replace the controversial s. 431 of the Code of Criminal Procedure (V of 1898) with s. 394 of the Code of Criminal Procedure 1973, which enacts as follows:

> 394(1) Every other appeal under s. 377 or s. 378 shall finally abate on the death of the accused.
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:
>
> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.
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> Explanation - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

The newly added proviso provides that an appeal against conviction and sentence of death or imprisonment will not abate on the death of the appellant if his near relative specified in the explanation obtains leave of the Court to continue the appeal.

The Indian cases referred to by the learned Counsel for the widow in regard to s. 431 of the Code of Criminal Procedure (V of 1898) and s. 394 of the Code of Criminal Procedure 1973, viz: *Bhulan Lal, Applicant v. The State* [1954] AIR Allahabad 783, *Harnam Singh, Appellant v. The State of Himachal Pradesh, Respondent* [1975] AIR SC 236, and *Om Prakash etc., Appellants v. The State of Haryana & Anor, Respondents* [1979] AIR SC 1266 have no relevance in the Malaysian context, in particular in regard to s. 320 of the CPC for one simple reason. That reason is this. In India, by virtue of s. 70 of the Indian Penal Code the fine once imposed constitutes a liability on the estate of the deceased and the legal representatives on whom the estate devolves are entitled to ward off that liability. Section 70 of the Indian Penal Code reads thus:

> The fine, or any part thereof which remains unpaid, may be levied, at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Briefly, s. 70 of the Indian Penal Code enacts a rule of limitation regarding the period within which a fine may be recovered. The liability of the offender for the the fine does not cease even with his death, for, on his death the fine may still be recovered from "any property which would, after his death, be legally liable for his debts" (*State v. Krishnan Pillai Madhavan Pillai* [1953] AIR TC 233 at page 234).

The three Indian cases referred by the learned Counsel for the widow were decided in the context of s. 70 of the Indian Penal Code and certainly could not and should not be adopted when interpreting s. 320 of the CPC. Our Malaysian Penal Code does not have the equivalent of s. 70 of the Indian Penal Code.These three Indian cases show a singular principle in that the representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a "sentimental interest", for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao* [1964] SC 1645).

On the other end of the scale, under English law, a fine is in the nature of a monetary penalty which is due to the Crown, and when a man is sentenced to pay a fine, there at once arises a debt of record (that is, by Judgment) to the Crown. Thus, where an accused was sentenced to imprisonment and fine and the sentence also provided for imprisonment in default of payment of fine, and when the accused died while serving the imprisonment without paying the fine, it was held that the fine could be recovered by the Crown from the personal representatives of the accused even after his death (*H.M. Treasury v. Harris* [1957] 2 All ER 455). In *Hodgson v. Lakeman* [1943] 1 KB 15, a fine of 35s. was imposed on Hodgson after the Court convicted

him, in his capacity as a Council's clerk, for an offence committed by the Cumberland County Council for breaching the Lighting (Restrictions) Order 1940. Hodgson entered an appeal against his conviction and on his application the justices stated a case, but he died before the appeal could be heard by the High Court. In a short Judgment, Viscount Caldecote CJ held that when an appeal to the High Court against a conviction by justices has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the Court has jurisdiction to allow the executors to prosecute the appeal. In contrast would be the case of *R v. Rowe* [1955] 2 All ER 234, where Ivor Clyde Rowe was convicted at Bedford County Quarter Sessions on 18 February 1955, of false pretences and sentenced to eighteen months' imprisonment. On 21 February 1955, he gave notice of application for leave to appeal against conviction, but on the night of 6/7 March 1955, he died in prison. His widow now applied for leave to continue his application. Lord Goddard CJ after referring to *Hodgson v. Lakeman* (*supra*) held that the sentence being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the Court's allowing them to continue the appeal, and accordingly the application was refused.

Likewise, in the present appeal, the widow has no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased appellant before his death and without the benefit of an equivalent provision like s. 70 of the Indian Penal Code, the widow has no *locus standi* to prosecute this appeal. Section 320 of the CPC needs to be amended to keep up with the times. Perhaps the Parliamentary Draftsman of the Attorney-General's Chambers may see fit to amend s. 320 of the CPC in the near future to delete the words in bracket ("except an appeal against a sentence of fine") which are clearly superfluous and redundant in view of the absence of an equivalent s. 70 of the Indian Penal Code in our Malaysian Penal Code. The composite sentence imposed on the deceased appellant cannot be construed to be a sentence of fine within the meaning of the second limb of s. 320 of the CPC. Those words in bracket in s. 320 of the CPC relate to a situation where upon conviction, the sentence imposed was a sentence of fine only. This must surely be the intention of the legislature for the words preceding it "every other appeal under this Chapter" would by necessity refer to an appeal against conviction. On convictions, the sentences may take any one of the following forms:

(1) death.

(2) imprisonment, which may be either be:

(a) imprisonment for life.

(b) imprisonment for a definite period.

(c) imprisonment in default of a fine.

(d) whipping. Section 291 of the CPC spells out the situation where whipping is finally stopped. In such a situation, the Court which imposed the sentence needs to revise it and may in its discretion either remit such sentence or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed to imprisonment for a term which may extend to twelve months. This additional term is above any other punishment to which the offender has been sentenced for the same offence. Generally, the sentence of whipping is imposed where there is evidence of violence or brutality (see *Lim Tien Hin & Ors v. R* [1953] MLJ 213, *Mohamed Ali v. PP* [1956] MLJ 84 and *Hoe Kin Luan v. PP* [1959] MLJ 159).

(3) fine, which is defined in s. 2(1) of the CPC to include "any fine, pecuniary penalty or forfeiture or compensation adjudged upon any conviction of any crime or offence or for the breach of any law for the time being in force by any Court in the Federation."

(4) compensation orders and costs. Section 426 of the CPC gives power to the Court to order compensation to victims of offences and costs of prosecution. The offender must have been convicted. The payment of compensation may be made "to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed". See *Mohamed Johan Mutalib v. PP* [1978] 1 MLJ 213 PC. Section 173A(iii) of the CPC empowers such compensation for injury or for loss (not exceeding the sum of fifty ringgit) or to pay such costs of the proceedings as the Court thinks reasonable or to pay both

compensation and costs. Section 294(ii) of the CPC also empowers the Court to direct the offender to pay the costs of the prosecution or some portion thereof within such period and by such instalments as may be directed.

(5) police supervision (see s. 295 to 299 of the CPC).

(6) bonds for good behaviour (see s. 173A and 294 of the CPC); and

(7) orders under the Juvenile Courts Act 1947 ("the JCA"). Section 12(1) of the JCA lists the orders which can be handed down. They include: admonish and discharge; a discharge upon the offender entering a bond to be of good behaviour; committal to the care of a relative or other fit person; an order for his parents or guardian to execute a bond to exercise proper care and guardianship; a probation order under s. 21 of the JCA; an order of committal to an approved school or Henry Gurney School; an order to pay a fine, compensation or costs; and imprisonment, if the offender is a young person.

In construing a statute, the Court must always be wary and should not attempt to give the statute an effect that it is a worthless piece of legislation (*Smith Kline & French Laboratories Ltd. v. Salim* (Malaysia) Sdn. Bhd [1989] 2 MLJ 380, 382). It is also germane to state that the Court must give effect to the clear and expliclt language of the enacting words of the section and cannot by any stretch of imagination disregard them unless it is apparent that some other meaning is intended (*PP v. Cho Beow Hin* [1982] 1 MLJ 135). Again, it had been said that where the meaning of the words in the statute are plain and unambiguous, Judges should not invent fancy ambiguities (*Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529, 541). And finally, the first task of the Court is to find out the intention of the legislature for the words of a statute speak the intention of the legislature (Maxwell on **Interpretation of Statutes,** 12 Edn., pp. 1 and 2). Thus, the clear words in bracket of the second limb in s. 320 of the CPC refer only to an appeal against a sentence of fine and cannot be read to include a composite sentence of both imprisonment and a fine plus a penalty like the present appeal. Clearly, therefore the death of the appellant brought an immediate end to his appeal.

TENG CHANG KHIM

v.

SURUHANJAYA PILIHANRAYA, MALAYSIA

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING SUMMONS NO.R2-24-90-93]
16 APRIL 1994

ELECTION LAW: Election Commission proposing recommendations affecting constituency - Plaintiff objecting to proposed recommendations - Election Commission calling for local enquiry - Plaintiff applying to be represented by advocate & solicitor at hearing of enquiry - Plaintiff's application rejected - Whether plaintiff had a legal right to be represented by an advocate & solicitor at the local enquiry.

The defendant proposed recommendations affecting the Siputeh Parliamentary Constituency P101 (the constituency) under s. 4 of Part 11 of the Thirteenth Schedule (the said Schedule) to the Federal Constitution. The plaintiff and 122 other registered voters of the constituency signed a memorandum objecting to the proposed recommendations. The defendant held a local enquiry as prescribed by s. 5 of Part 11 of the said Schedule. The plaintiff attended the enquiry and orally applied to be represented by an advocate & solicitor which application was rejected by the defendant.

The plaintiff sought a declaration that he had a legal right to be represented by an advocate and solicitor at the local enquiry. The plaintiff also sought a declaration that the denial by the defendant in allowing the plaintiff to be represented by an advocate and solicitor at the said enquiry has rendered the proceedings null and void, unconstitutional and of no effect thereby rendering the recommendations for Parliamentary and State Constituencies in the States of Malaya as reviewed by the defendant in 1993 a nullity.

Held:

[1] As there is no provision in the Federal Constitution particularly the said Schedule which gives the plaintiff the right to be represented by Counsel at the enquiry, the plaintiff has no right to be legally represented.